



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Platt & Gachuhi JJA)

CIVIL APPLICATION NO NAI 28 OF 1987

BETWEEN

MUGAH..... APPELLANT

AND

KUNGA.....RESPONDENT

(Application for stay of execution pending appeal from orders of the High Court at Nairobi, O'Connor J)

RULING

April 29, 1988, **Nyarangi, Platt & Gachuhi JJA** delivered the following Ruling.

The applicant by way of motion applied for stay of execution and an order for injunction under rule 5(2) (b) of the Court of Appeal Rules pending the hearing of an appeal. Under a certificate of urgency, he applied for *ex parte* orders pending the hearing of the motion *inter partes*.

The court on March 6, 1987 granted an interim stay of execution of the order made by the High Court on December 5, 1986 and also an interim injunction to preserve the status quo so that the applicant may stay in his land and prevent his being evicted pending the hearing of the application which was fixed *inter partes* for hearing on March 16, 1987.

On March 16, 1987, at the conclusion of the argument, the ruling of the court was reserved. The interim orders granted on March 6, 1987 were to continue in force until the time of delivery of the ruling. However, the applicant's advocate was to furnish this court with copies of all previous proceedings on or before March 30, 1987 to enable this ruling to be written.

Copies of the proceedings were filed in the registry on January 18, 1988. From the record of the proceedings before the High Court it appears that the applicant filed an originating summons in Civil Case No 3645 of 1983 in which he claimed an interest in a piece of land Mwerua/Mukure/23 on adverse possession. In his affidavits, the applicant claimed that he had lived on the land since April, 1960 when he was given possession under a contract of sale. He also claimed to have carried out extensive development. All these allegations were denied by the respondent in his replying affidavit. The respondent filed an application for striking out the originating summons on the grounds of want of prosecution and of *res judicata*.

After the hearing the argument, O'Connor J delivered his ruling on December 5, 1986 striking out the

originating summons under order VI rule 13 of the Civil Procedure Rules. The applicant informally applied for stay of execution but the judge refused to grant the order stating that there was nothing to stay in the matter. The applicant filed his notice of appeal on December 16, 1986.

On January 7, 1987 the respondent appeared before Rauf J and obtained an *ex parte* order on an application to restrain the applicant from trespassing on the land the subject matter of the struck out originating summons. On February 23, 1987 a further order was granted by O'Connor J committing the applicant to civil jail for 48 hours for failing to comply with the *ex parte* court order made on January 7, 1987. A notice of appeal against the order of February 23, 1987 was filed on February 24, 1987.

It is worthwhile to note that the applicant in this application is seeking a stay of execution against the orders made on December 5, 1986 in which the originating summons was struck out and against the *ex parte* order made on January 7, 1987 restraining the applicant from trespassing on the land.

No notice of appeal has been lodged against this order and from the proceedings, it does not appear whether or not the respondents' application upon which an *ex parte* order was obtained has been heard, though an order for execution by imprisonment was obtained on February 23, 1987.

It is also not clear whether execution by way of arrest and committal to civil jail was carried out as the notice of appeal was immediately lodged with this court.

As the matter stands, the applicant was aggrieved by the order of the court striking out the originating summons to which he has lodged notice of appeal. He is now being confronted with an order restraining him from entering the land which he has developed and where he has a home.

The order will restrain him from picking his tea or staying in his house which is on the land. His application for stay of execution pending the determination of his appeal was rejected by the High Court.

The practice of this court, in the case of land, which is a sensitive issue is that the parties should be allowed to come to this court to have the issues involved in their dispute, determined by the court of last resort, *John Kuria v Kalen Wahito* Civil Appeal NAI 19/83 (unreported).

For the parties to come to this court, the court is to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. This approach was laid down in *Butt v Rent Restriction Tribunal*, Civil Appeal NAI 6 of 1979, which practice has been followed ever since. The courts' view is that status quo should be maintained until the appeal is heard and determined. It is for these reasons that we allow the application in terms of the following orders:

(a) That the orders made on December 5, 1986, January 7, 1987 and February 23, 1987 are hereby stayed until the final determination of the intended appeal in High Court Civil Suit No 3645 of 1983 (OS).

(b) The status quo shall be maintained until the final determination of the intended appeal.

(c) The undertaking as to damages in writing given on or about March 18, 1987 shall be extended till then.

(d) Cost of this application shall be costs in the cause.

Dated and delivered at Nairobi this 29th day of April, 1988

J.O. NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL